Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

APPENDIXES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1870

YESTERDAY'S CHILDREN, et al.,

Plaintiffs-Appellants,

v.

MARGARET KENNEDY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois. No. 75 C 378
Wilbur F. Pell, Jr., Thomas R. McMillen and Alfred Y. Kirkland, *Judges.*

ARGUED NOVEMBER 1, 1977—DECIDED DECEMBER 29, 1977*

PETITION FOR REHEARING DENIED JANUARY 16, 1978

Before CUMMINGS and BAUER, *Circuit Judges,* and GRANT, *Senior District Judge.***

CUMMINGS, *Circuit Judge.* Plaintiffs are eight adults who were adopted as infants and Yesterday's Children, which is a not-for-profit Illinois corporation consisting of approximately 6,000 adults who were also adopted as infants. Their civil rights complaint was brought under 42

* This appeal was originally decided by unreported order on December 29, 1977. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

U.S.C. § 1983 against four Illinois officials[1] and the presiding judge, County Division, of the Circuit Court of Cook County. Plaintiffs sought injunctive relief and a declaratory judgment that two Illinois statutes[2] violate the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments because they prevent the individual plaintiffs from ascertaining their natural parents' identity. They also sought a declaratory judgment that defendant officials and officials of private agencies acting under color of state law violate those amendments by preventing plaintiffs from ascertaining the identity of their natural parents. The individual plaintiffs claim that they were denied access by defendants to the names of their natural parents or, in one instance, the name of her natural brother.[3] Seven of the named plaintiffs are members of Yesterday's Children. None of the plaintiffs sought any relief in the Illinois courts.

According to plaintiffs, Illinois has maintained a statutory and "actual policy" of preventing adopted children from discovering the names and circumstances of their natural parents and blood relatives. Similarly, adoption agencies formalized by Illinois statute and licensed by the employees of the Illinois Department of Children and Family Services have denied adoptees this information. Adoptees have been able to review their adoption records "only if they can demonstrate critical medical reasons to justify their request" (Complaint par. 27). Plaintiffs claim that their constitutional rights have

[1] The Director of the Illinois Department of Children and Family Services, the Director of the Illinois Department of Public Health, the Clerk of Cook County, and the Attorney General of Illinois.

[2] Ill. Rev. Stat., ch. 4, § 9.1-18 and ch. 111½, § 73-17(2)(a) and (4).

[3] In discovery, two of the plaintiffs revealed that they had uncovered the information by their "own methods." If the plaintiffs were seeking damages this admission might be significant (cf. *Carey v. Piphus,* 545 F.2d 30 (7th Cir. 1976), certiorari granted, 45 LW 3690) but defendants have not argued that this admission should affect plaintiffs' request for declaratory and injunctive relief.

been violated by the two statutes in question,[4] by a General Order entered by the presiding judge of the County Division of the Circuit Court of Cook County on February 21, 1974, which provides that "* * * all adoption files in the offices of the Clerk of the Circuit Court shall be impounded and shall be released only upon an order issued from the County Division of the Circuit Court," and "by the action of state officials and private child adoption agencies acting under the color of state law" (Complaint par. 32).

The constitutional violations are alleged as follows (Complaint pars. 33-35):

> "The State of Illinois has denied the Plaintiffs their Fourteenth Amendment rights to the equal

[4] The statutory provisions assailed in the complaint are as follows:

Ill. Rev. Stat., ch. 4, § 9.1-18:

> Records confidential. The word 'illegitimate' or the words 'born out of wedlock', or words importing such meaning, shall not be used in any adoption proceeding in any respect.
>
> Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may, order that the file relating to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order.

Ill. Rev. Stat., ch. 111½, § 73-17(2)(a):

> Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation.

Ill. Rev. Stat., ch. 111½, § 73-17(4):

> When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

> protection of the laws by preventing their access to information concerning their background, based on the suspect classification of their status as adoptees.
>
> "The Plaintiffs' rights to acquire useful information (including the right to determine their natural heritage) have been violated. These liberties are protected by a penumbra of rights emanating from the Bill of Rights, specifically the First, Fifth, Ninth and Fourteenth amendments of the U.S. Constitution.
>
> "The Plaintiffs' rights to be free from involuntary servitude as protected by the Thirteenth Amendment to the U.S. Constitution have been violated by the statutes and actions complained of. As adopted infants the Plaintiffs were placed into a chattel status—an unfortunate but explicable happenstance. However, the state's continued insistance [sic] on maintaining that chattel status even into adulthood and until death violates the Plaintiffs' Thirteenth Amendment rights."

In June 1975, the district judge to whom the case was originally assigned declined to convene a three-judge court on the ground that this General Order of the Circuit Court of Cook County "lies at the heart of the matter" and should be reviewed before any statutory question need be reached. In October 1975, he dismissed the complaint without prejudice on the ground of abstention because "the complaint involves a basic question of State public policy which has not been passed upon by the State courts, *i.e.*, whether the plaintiffs should generally be deprived of access to the record of their personal origins."

The dismissal was appealed and in May 1976 this Court handed down an order holding that a three-judge court was required to hear plaintiffs' constitutional challenge because the complaint "presented a substantial

federal question." By dictum,[5] the panel considered abstention to be inappropriate.

In August 1977, a three-judge district court granted defendants' motions to dismiss the action without prejudice on the grounds of abstention.[6] The opinion reasoned that the Illinois courts could "apply the [two] statutes in such a way as to withstand constitutional attack" (mem. op. 6). To support abstention, the opinion relied principally on *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471; *Bellotti v. Baird*, 428 U.S. 132; and *Juidice v. Vail*, 430 U.S. 327.[7] We have jurisdiction of this appeal from that decision because the three-judge district court did not reach the merits of plaintiffs' constitutional arguments (*MTM, Inc. v. Baxley*, 420 U.S. 799), nor do we. Our affirmation is based solely on abstention.

I. *Analysis of the State Court Construction of Challenged Statutes and General Order.*

After this appeal was filed, the Circuit Court of Cook County, County Division, County Department, handed down an unreported opinion dealing with the above statutory provisions in *In the Matter of Daniel Doe*, 76 Co 2436 (November 22, 1977). In that case, an emotionally disturbed adoptee, represented by the same counsel as these plaintiffs, sought knowledge of his familial background at the suggestion of his psychiatrist, and the

[5] Even if the dictum were somehow considered binding at the time, the presence of intervening Supreme Court decisions (*e.g., Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471; *Bellotti v. Baird*, 428 U.S. 132) would justify a second look at the abstention question. See 1B Moore's *Federal Practice* ¶0.404[2]; cf. *Bradley v. Richmond School Board*, 416 U.S. 696.

[6] The Association for the Protection of the Adoptive Triangle was permitted to file a brief *amicus curiae* below. It has also filed an *amicus* brief here urging affirmance.

[7] As additional support, the opinion cited *Colorado River Water Conservation District v. United States*, 424 U.S. 800; *Trainor v. Hernandez*, 431 U.S. 434; and *Wooley v. Maynard*, 430 U.S. 705. See also *Huffman v. Pursue, Ltd.*, 420 U.S. 592.

court decided that the adoption record should be released on the following conditions:

> "It is therefore ordered that ..... be appointed as investigator and friend of the court to investigate this matter. He shall contact the biological parents and the adoptive parents, give them notice of the pendency of this proceeding and that the records will be released if the evidence of substantial harm is not presented to this Court. The biological parents and the adoptive parents will be given leave to intervene and show by a preponderance of the evidence that substantial harm will transpire if the relief requested is granted. Absent such a showing, this Court will order the adoption records be opened for petitioner's examination, and the original birth certificate be opened for the petitioner's inspection. Ill. Rev. Stat. Ch. 4, § 9.1-18, Ch. 111½ § 73-17.
>
> "If the investigator is unable to locate the biological parents or the adoptive parents within a reasonable period of time, the petitioner will be required to publish notice of the pendency of this proceeding for 30 days in a publication of general circulation. If no appearance is made, and no showing of substantial harm is presented, the relief requested will be granted."

In the well-reasoned opinion, the state court judge noted that no Illinois appellate court had yet interpreted the statutory provisions in question but that most states requiring the sealing of adoption records permit the unsealing of those records upon a showing of good cause. Judge Schneider observed that in Scotland adoption records have been open to any adoptee who has reached the age of 17, and that Parliament recently enacted a similar law for England and Wales. After noting the arguments that the Illinois statutes might violate the Due Process and Equal Protection clauses of the Fourteenth Amendment, be inconsistent with the penumbra of rights emanating from the Bill of Rights in the Federal Constitution or be unconstitutionally vague, the court concluded that under the Illinois statutes, the rights of adoptees, their biological parents, and their

adoptive parents have to be weighed against "possible detrimental effects." Consequently, the court adopted the above procedure "to balance those rights, and on the basis of the unique facts in each case, arrive at an equitable and just solution."

It is thus apparent that the *Daniel Doe* court would not limit the unsealing of adoption records to cases where adoptees can show "a probable and serious heriditary problem" or "critical medical reasons," as claimed by plaintiffs (Br. 3, 5) or where "genetic, medical, psychological or other problems manifest themselves as requiring such information or where neither party objects to the disclosure."[8] Instead in *Daniel Doe* the following standard has seemingly been read into the statutes and General Order: the petitioner must show by a preponderance of the evidence that, as an adult, he or she has a real and immediate need for such records, and if such a showing is made, the biological and adoptive parents in order to avoid unsealing must show by a preponderance of the evidence that substantial harm will transpire if the relief requested is granted.

II. *Application of Abstention Principles*

Despite this construction by one state trial court, it appears that abstention to allow more expanded consideration by the Illinois courts may "materially alter the constitutional issue presented" (*Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481), and that the benefits of such abstention are not "too

[8] This pre-*Daniel Doe* quotation appears in plaintiffs' principal brief (at pp. 4, 10) and in their reply brief (at pp. 2, 3) and is taken from p. 7 of defendants' memorandum below and from p. 15 of their brief here. Although this is one possible interpretation of the statutes and General Order, both parties' use of the phrase "or other problems" indicates that unsealing may be appropriate in other undefined cases or perhaps when good cause is shown. At oral argument, defendants suggested that a court might interpret a plaintiff's adulthood to constitute good cause and that a standing court order could so provide, or a regulation under Ill. Rev. Stat., ch. 111½, § 73-17(2)(a). We leave it to the Illinois courts to determine which of the many possible standards and definitions will be applied.

speculative to justify or require avoidance of the question presented." *Id.* The fact that a state trial judge read a type of good cause requirement into the statutes and General Order[9] does not remove their ambiguity for two reasons. First, good cause is subject to many diverse interpretations. See *Bellotti v. Baird*, 428 U.S. 132, 143-146, 148.[10] While it could be argued that Judge Schneider offered a more specific standard than good cause, even that arguably more specific standard does not contraindicate the benefits of abstention because it merely substitutes for good cause several other broad terms that were not defined in the unreported *nisi prius* opinion and will have to await further interpretation. The *Daniel Doe* opinion does indicate that on the facts there, the petitioner must show by a preponderance of the evidence that he has a real and immediate need for the information; and if such a showing is made, the biological and adoptive parents must show by a preponderance of the evidence that substantial harm will result if the information is released. However, the opinion offers little reasoning for finding that the petitioner had shown a "real and immediate need," and given the procedural posture of the case, the parents had

[9] As the three-judge court explained, absent the Illinois statutes, the General Order may not reflect state-wide policy and therefore might not be a proper subject for review by that tribunal (mem. op. 7). See *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n. 2.

[10] Although Justice Blackmun's opinion for the Court in *Bellotti* discussed abstention in order to allow states to interpret "unconstrued" statutes, 428 U.S. at 147, we do not view that language as prohibiting abstention in cases in which statutes have been construed by a state court but remain unclear. In *Kusper v. Pontikes*, *infra*, for example, the Supreme Court was asked to abstain from a challenge to an Illinois statute that already had been construed by Illinois courts. While the Court declined to abstain, instead of basing its decision on the rationale that the statute already had been construed, its decision was based on the fact that after examining the statute in light of the state opinion, the Court found it sufficiently clear. See *Carey v. Sugar*, 425 U.S. 73. Here, however, our examination of state law reveals that it is sufficiently unclear to be susceptible of an interpretation that would alter the constitutional issue.

not yet made a showing, and therefore the term "substantial harm" was left undefined.

Second, even if Judge Schneider's unappealed opinion did define conclusively all the unclear standards, until an Illinois reviewing court (which will of course be fully competent to adjudicate constitutional claims, *Doran v. Salem Inn Inc.*, 422 U.S. 922, 930) considers the statute and the General Order, their construction will remain in doubt despite Judge Schneider's persuasive opinion. As the Second Circuit held in *Connecticut State Federation of Teachers v. Board of Education*, 538 F.2d 471, 485 (1976), decisions by state trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate, at least in the absence of a similar decision by the state's appellate courts.[11] Cf. *Commissioner v. Estate of Bosch*, 387 U.S. 456.

Given this need for appellate review of the *Daniel Doe* interpretation and the ambiguities that remain despite that interpretation, this case is one in which the state courts by further explicating the standards for unsealing may construe the statutes and General Order so as to materially alter plaintiffs' constitutional challenge. See *Kusper v. Pontikes*, 414 U.S. 51, 54-55; *Harrison v. NAACP*, 360 U.S. 167, 177. Like the statute in *Bellotti*, the Illinois statutes and General Order challenged here and the standards of proof implied therein are "susceptible" to so many different interpretations,[12] requirements and applications that "it is impossible to define precisely the constitutional issue presented." 428 U.S. at 148.

Plaintiffs seek to avoid abstention by arguing that their case includes a claim that merely being required to appear in court infringes their right to information and their right to equal protection and that therefore no conceivable state court construction would materially

[11] The Supreme Court's reference to reported decisions of two New York trial courts in *Carey v. Sugar*, 425 U.S. 73, 78, is distinguishable because those decisions were reported and seemed to follow a trend first begun by the state's highest court. See *id.*

[12] See *e.g.*, note 8 *supra*.

alter that claim. However, a fair reading of plaintiffs' complaint reveals that the essence of that complaint disputes the standards on which courts could release the information and not the requirement of a court appearance. See *e.g.* ¶24. Had this Court in its May 1976 order in this case understood the complaint to be merely objecting to the requirement of a court appearance, judging from its reasoning it probably would have declined to convene a three-judge court based on the lack of a substantial federal question.

Indeed, not only does this case satisfy the *Hodory* branch of abstention, but it is arguably a case in which there are "~~different~~ questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District, supra*, at 814.

Under either branch of abstention, unlike the plaintiffs in *Vickers v. Trainor*, 546 F.2d 739 (7th Cir. 1976), plaintiffs here have not demonstrated that "substantial personal consequences" (see *Bellotti v. Baird, supra*, at 151) would result from whatever delay a state adjudication would entail.[13] Unfortunately, *Daniel Doe* is not the

[13] It does not minimize plaintiffs' claims to note that those claims are less immediate than the need for an abortion at issue in *Bellotti* or even the daily confinement at issue in *Vickers*. In any event, *Bellotti* leaves unclear whether a court in abstaining need make a specific inquiry into the issue of delay and if so on whom the burden of proof should be placed. See 428 U.S. at 143 n. 10. On the facts of this case and in the absence of argument by the plaintiffs, we decline to hold that any harm of delay affects our conclusion on the need for abstention.

final Illinois word in construing these statutes and General Order, and at least in the absence of equitable considerations to the contrary it is advantageous in this case to allow the state courts of review to define the statutes and General Order further. Therefore, we agree with the court below that it was inappropriate for it to reach the merits of this controversy.

Order affirmed.

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APPENDIX 2

IN THE CIRCUIT COURT OF
COOK COUNTY, COUNTY DEPARTMENT
COUNTY DIVISION

In the Matter of)
) 76 Co 2436
Daniel Doe)

ORDER

Daniel Doe an adoptee, petitioned this Court for the release of all original documents which might assist him in learning the identity and whereabouts of his natural parents. His petition alleged that he had been under intensive psychotherapy for some eleven years. Further, that his psychiatrist believed that much of the emotional distress and insecurity the petitioner felt would be alleviated if he received the requested information. The State of Illinois, represented by Bernard Carey, State's Attorney of Cook County responded to the petition.

A hearing was held wherein the

petitioner introduced testimony that he suffered severe emotional problems. Pettitioner testified that he had been seeing a psychiatrist for about thirteen (13) years. He had overdosed on pills on seven occasions. On the last occasion he was in a coma for about 36 hours.

Expert testimony of Dr. John Utley, M.D., a board certified psychiatrist, showed that Doe had suffered severe depressions and anxiety. He testified that when the petitioner overdosed on drugs it was an intentional act of self-destruction. The Doctor testified further that while finding the petitioner's natural parents would not solve all his emotional problems, it would be beneficial.

Dr. Edward Kelleher, a board certified psychiatrist, testified for the State. He stated that he had conducted

two interviews with Doe. His diagnosis was that the petitioner had a schizoid type personality and that he was suffering from a mixed type of neurosis. When asked whether the information requested might aid in the petitioner's treatment, the doctor replied that there was no assurance that it would, but conversly there was no certainty that it would not help.

This Court finds jurisdiction to order adoption records impounded or to release such impounded records in the Adoption Act. The statute provides:

> . . . the Court may order that the file relating to such proceeding shall be impounded by the Clerk of the Court and shall be opened for examination only upon special order of the Court which shall name the person or persons who are to be permitted

to examine such file. . .
Ill. Rev. Stat. Ch. 4 §9.1-18.*

A substantailly similar provision is contained in the Vital Records Act for the inspection or certification of an original birth certificate. Ill. Rev. Stat. Ch. 111 1/2, §73-17.

While no court of appellate jurisdiction has interpreted this statute in Illinois, the great majority of jurisdictions today have a similar statute which requires sealing the records of adoption proceedings. See Note, The Adoptees Right to Know His Natural Heritage, 19 N.Y.L.F. 137 (1973). Generally, these statutes prohibit access to the identity or possible whereabouts of the biological

* This provisions of the Adoption Act was substantially the same in 1946 when Daniel Doe was adopted. However, his adoption records were impounded on the motion of the adoptive parents in 1955.

parents except by order of court.

The sealing of adoption records serves three main purposes. First, it protects the privacy rights of the adoptive parents, and assures them they will not be subjected to interference from the natural biological parents. This is especially important during the formative years of child development. Sealed Records In Adoptions: The Need for Legislative Reform, 21 Catholic L. 211, 212 (1975). Second, it protects the biological parents from any stigma that may flow from the adoption process. Id. The interest these sealed records statutes were primarily designed to protect, however, is the psychological parent-child relationship between the adoptee and the adopting parents. Id at 213. These statutes further protect the child by isolating him from any stigma that may attach to his

birth. Id.

Most of these sealed records laws require a showing of "good cause" before the records may be unsealed. (c.f. See Alabama and Kansas law which allow the adoptee to see his original birth certificate and Virginia and South Dakota which allow the adoptee to read the proceedings up reaching majority.) The standards for court orders are usually not defined beyond a vague statement of "good cause" or "in the Court's discretion." See Sealed Records, Supra at 214. Ill. Rev. Stat. Ch. 4, §9.1-18 (1975). Courts in general have been reluctant to open these records. In Re Wells, 281 F2d 68 (1960, (biological mother denied access because she did not prove fraud); In Re Minicozzi, 273 N.Y. S.2d 634 (1966), (alleged father needed records for defense of civil suit).

Two recent New York Surrogate's Court decisions took what may be a more logical approach to these cases. New York required "good cause" to open sealed adoption records. N.Y. Dom. Rel. Law. §114 (1975). The first case, Matter of Ann Carrol S., 172 N.Y.L.J. 31, August 13, 1974 at 12, col. 6 (Sur. Ct. Bronx Co.) involved a forty year old woman who had been adopted in 1937. She had carried on a relatively normal existence during her adult life. However, expert testimony was offered that she was recently having trouble with her social adjustment because of an overriding desire to find her biological parents. This social adjustment problem had become manifest when she suddenly terminated her engagement with the man whom she was to marry. Id.

The Court engaged in a weighing

process. The petitioner adoptee had no adoptive siblings nor was there any evidence of natural brothers or sisters. Her adoptive parents were dead. There was no evidence of other natural relatives that would be adversely effected. The Court therefore concluded that although this was not the strongest case of good cause, some emotional benefit might accrue to her by revealing the information in the court files. Since the evidence was so slight, of any possible injury to those other than the petitioner, this Court unsealed the files.

A second case, Estate of Katrina-Maxtone-Graham, 173 N.Y.L.J. 66, Apr. 7, 1975, at 17, col. 4 (Sur. Ct. N.Y. Co), involved in a slightly more complicated factual situation. The petitioner had requested copies of her adoption file

from the Children's Aid Society complaining of mental distress from her need to know of her biological roots. The trial judge after hearing the case gave an order requiring the Society to hire a private investigator to attempt to locate the petitioner's mother. The investigator was paid by the petitioner, but was to report only to the Society. When the investigator found the mother, he was to report back to the Society which would then notify the Judge. The Court would then appoint an attorney to interview the mother, advise her of her rights, and attempt to obtain consent to open the files. If the natural mother refused to consent, only then would the Court make a final decision on whether the file should be opened and the petitioner advised of its contents. The order was appealed and af-

firmed. 358 N.Y.S. 2d 663 (1974). The investigator failed to find the mother, but the petitioner, through independent means, did. The mother consented to the disclosures.

The Society protested that the entire file should be released because it contained names of foster parents that had cared for the petitioner before adoption. The petitioner claimed a right to the full history in the file. The Court held that the needs of the Society for keeping records of foster parents confidential outweighed the petitioner's needs. Since the foster parents had no contact with the petitioner for over thirty years, this Court ruled that the names should be deleted before the files was released. Only the names of the biological parents were released.

A recent survey was conducted by

sending letters to the heads of the departments in charge of adoptions in the various states. Sealed Records, Supra at 113 n.6. The replies indicated that few adoptees are successful in getting their records released. Id. Some states did acknowledge giving non-identifying information such as a medical history. However, the replies indicated that the vast majority do not give the names and places requested. Id.

Open adoption records have been found to be of positive value to the adoptee. Note, The Adult Adoptees Constitutional Right to Know His Origins, 48 So. Cal. L. Rev. 1196, 1203 (1975). In Scotland adoption records have been open to any adoptee who has obtained an age of 17. 20 & 23, Geo. 5c 37 §11 (8). A study based on the Scottish law concluded that

"no person should be cut off from his origins." J. Triseloitis, In Search of Origins: The Experiences of Adopted People (1973). The study stated that open records were beneficial to adoptees even when the information found was originally upsetting. On the basis of the study, Parliment recently enacted a similar law for England and Wales. Klibanoff: Genealogical Information in Adoption: The Adoptee's Quest and the Law, 11 F.L.Q. 185 (1977).

In other jurisdictions constitutional arguments have been raised that the statutes which deny access to the adoptees records may deny due process and equal protection of the law. See. Note: Recognizing the Needs of Adopted Persons: A Proposal to Amend the Illinois Adoption Act. 6 Loy. Chi. L.J. 49 (1975); The

Adult Adoptees, Supra; Note: The Adoptee's Right to Know His Natural Heritage, 19 N.Y.L.F. 137 (1973). The challenges were presented on several theories. The first was that the equal protection clause of the Fourteenth Amendment guarantees the right to be free from unwarranted discrimination. The use of the status of "adoptee" to deny knowledge of the person's natural heritage was therefore in violation of equal protection. Adoptee status like that of race, lineage, or alienage, one author concluded, was a class based on "suspect criteria." Therefore, it became the burden of the state to show that there was a compelling state interest that was served by keeping the records secret. See: The Adoptee's Right, Supra, 137-56. The argument continued that keeping the records sealed did not serve

any valid state purpose and the law was therefore unconstitutional.

The second argument was that the right to know one's heritage is in the prenumbra of rights emanating the Bill of Rights. This must then be weighed against the privacy rights of the natural parents and the right of the state to keep adoptions anonymous. The balance the author of one article concluded should favor the adoptee. Recognizing the Needs of Adopted Persons, Supra, at 56 n 43.

A final argument was that the Illinois Legislature in not setting out the conditions under which the records may be opened made the Adoption Act unconstitutionally vague. The argument is that since the statute failed to give adequate guidelines as to the standards used and persons who need to receive notice, the statute was void for vague-

ness. Id. at 58 n 47.

The Superior Court of New Jersey in Mills v. Atlantic City Department of Vital Statistics, Doc, No. C-3349-75, Chancery Division 1977, decided that the New Jersey sealed records law was constitutional. The right to open one's adoption records, that Court concluded, was not a fundamental right. See p.7. Nor was the class of adoptees suspect. See p.17. The state therefore only needed a rational basis to establish legilation regulating the area. Since the statute did seek to protect the privacy interest of the parents, both natural and adoptive, the statute was valid. Id. at 18.

In Mills the Court went on to weigh the interest of the adoptees who were claiming a psychological need to know against the privacy needs of the parents.

P.21. Since the adoptee had more than a mere curiosity, this Court allowed the records to be unsealed. The Court then formed an order much like that used in Maxtone-Graham, Supra.

After reviewing the Illinois Statute and the case law in other jurisdictions and applying that law to the case at bar, this Court finds:

1. That the petitioner, Daniel Doe, has established a prima facie case for release of these records by showing by a preponderence of the evidence that he, as an adult, has a real and immediate need for such records.

2. That the biological parents have an interest in the case and due process requires that they receive notice of the proceeding and an opportunity to be heard.

3. That the adoptive parents have an interest in this case and due process requires that they receive notice of the proceeding and an opportunity to be heard.

This Court therefore concludes that absent a showing that the adoptive or biological parents will suffer substantial harm, the records shall be released. The burden will be shifted from the petitioner to the adoptive and biological parents to show by a preponderence of the evidence that the harm they will suffer will outweigh any benefit the petitioner might receive.

It is therefore ordered that Melvin Parnell be appointed as investigator and friend of the court to investigate this matter. He shall contact the biological parents and the adoptive parents, give them notice of the pendency of this pro-

ceeding and that the records will be released if the evidence of substantial harm is not presented to this Court. The biological parents and the adoptive parents will be given leave to intervene and show by a preponderence of the evidence that substantial harm will transpire if the relief requested is granted. Absent such a showing, this Court will order the adoption records be opened for petitioner's examination, and the original birth certificate be opened for the petitioner's inspection. Ill. Rev. Stat. Ch.4 §9.1-18, Ch. 111 1/2 § 73-17.

If the investigator is unable to locate the biological parents or the adoptive parents within a reasonable period of time, the petitioner will be required to publish notice of the pendency of this proceeding for 30 days in a pub-

lication of general circulation. If no appearance is made, and no showing of substantial harm is presented, the relief requested will be granted.

Each of the courts and authors cited agree that there may be some therapeutic value in opening adoption records. While some advocate an unfettered right to such information, the majority of authorities have attampted to balance the right of all the parties. This Court concludes that the benefits have to be weighed against the possible detrimental effects. The procedure enunciated in this order allows the Court to balance those rights, and on the basis of the unique facts in each case, arrive at an equitable and just solution.

ENTER:

DATE:

JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 24, 1976

(heard April 12, 1976)

BEFORE

HON. THOMAS E. FAIRCHILD, Chief Circuit Judge

HON. WILLIAM J. BAUER, Circuit Judge

HON. WILLIAM J. CAMPBELL, Senior District Judge*

YESTERDAY'S CHILDREN, a not for profit corporation, et al.,	)
Plaintiffs-Appellants,	)Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-1023	)
v.	)
MARY LEE LEAHY, Acting Director, Illinois Department of Children and Family Services, et al.,	)NO. 75 C 378)Thomas R. McMillen, Judge
Defendants-Appellees.	)

* The Hon. William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

O R D E R

This is a suit brough pursuant to 42 U.S. C. 1983 challenging the Illinois statutory scheme which prevents adults who were adopted as infants from gaining access to their original birth records and court documents. The Plaintiffs-Appellants are adult individuals from all walks of life. All were adopted as children. Each wishes to know the identity of his or her natural parents and relatives. Plaintiffs assert that under Illinois law they are denied a constitutional right of heritage of identity; i.e. the right of access to important personal and private information, the right of freedom of association to maintain a familial relationship with natural parents and relatives, and, the right to be treated equal under the law as all other non-adopted persons.

On appeal Plaintiffs claim that the trial court erroneously refused to convene a three-

judge court pursuant to 28 U.S.C. 2281 *[1] and 2284 and erroneously dismissed the complaint which presented a substantial federal question. We hold that a three judge court was required to hear Plaintiffs constitutional challenge. Consequently, we reverse and remand the case for the convening of a three judge court.

The facts presented are quite simple although the competing interests and constitutional issues appear to be somewhat complex. Under Illinois law any party of an adoption proceeding has the right to move the court to seal the adoption records.*[2] For twenty-five years all adoption records in Cook County have been customarily sealed and during the past two years there has been a general court order to that effect.

*[1] In this footnote the Court cites 28 U.S.C. 2281.

*[2] In this footnote the Court cites Ill. Rev. Stat. Ch. 4, §9.1-18 (1975).

An adoptee can obtain access to his or her adoption records or original birth certificate only by obtaining a court order. The Plaintiffs allege that this information generally is not made available by a court absent a probable and serious medical or hereditary problem. In addition private adoption agencies licensed by the state have interpreted Illinois law as preventing them from giving adoptees access to their records.

The trial court in effect abstained from deciding the issue presented because no state court had ruled on this question of state public policy. However, Plaintiffs-Appellants allege in paragraphs 27 and 28 of their complaint that they and other adoptees have sought unsuccessfully through the Illinois courts view of their files. In the instant case Plaintiffs allege that they have not petitioned the state courts for such records because experience has shown such a petition would be time consuming, expensive, and

fruitless since the courts will not release the information absent a medical reason. In addition, the Plaintiffs met with the various state officials (Defendants herein) and Judge Harry Comerford, the presiding judge of the Cook County Division of the Cuircuit Court, who indicated he was aware of the problem but that he believed adult adoptees should not have access to the records. Judge Comerford has the inherent as well as the discretionary statutory authority to seal the records of adoption.

In light of Plaintiffs-Appellents allegations we believe the tral court erred in abstaining. The two memorandum opinions by the trail judge indicated that he carefully reviewed the problem. We nevertheless reverse because the case involved fragile constitutional rights including First Amendment questions. Zwicker v. Koota, 389 U.S. 241, 88 S.Ct. 391 (1967); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116

(1965) Baggett v. Bullit, 377 U.S. 360, 84 S.Ct. 1316 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963). Recently the Supreme Court in Colorado River Water Conservation District v. United States, 44 L.W. 4372 (decided March 24, 1976) summarized the doctrine of abstention and stated:

> "Abstention from the exercise of federal jurisdiction is the exception, not a rule. '...abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest'...."

The Court set out three instances in which abstention would be proper: First, cases where the federal issue might be mooted or presented in a different picture by a state determination of local law. Second, cases which present difficult questions of state law bearing on policy problems of substantial public import whose importance

transcends the result of the case at bar. And, third, where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings (absent harassment, or a patently invalid state statute).

In this case we believe none of the three abstention situations are present. Obviously, there is no state criminal proceeding so the third type of case noted is inapplicable. The first mentioned case (where a federal question might be mooted by a determination of state law) also does not apply in light of Plaintiff's allegations that they have previously unsuccessfully sought access to their files in the state courts. Nor does the present suit fall squarely within the second category of abstention. The state law and policy in Illinois has been established for years. Adoptees simply are not allowed access to their records unless they come within narrow exceptions. This litigation is a direct challenge to that policy based on alleged constitutional rights.

Thus we do not believe this is a situation where principles of comity and federalism would dictate abstention. The result sought in the instant case is not transcended by the importance of the state policy or the difficulty of the question presented.

Finally we reach the problem of the propriety of convening a three judge court. This Court has jurisdiction to review the action of a district court in failing to convene a three judge court and in dismissing a compleint. Holiday Magic, Inc. v. Warren, 497 F2d 687 (7th Cir. 1974); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Shackman v. Arnebergh, 389 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1967); "Appellate Review of the Decision Whether or Not to Empanel a Three Judge Court," 37 U.Chi.L.Rev. (1969-70).

Although we can review the trial court's procedural decision, the constitutional questions cannot be decided here but must await a decision

by a three judge panel under 28 U.S.C 2281. As Judge Perry aptly stated in Holiday Magic, Supra

> "If the federal claims are substantial, the issues and the merits are for consideration by a three judge panel and this court does not express any opinion as to the ultimate resolution of the issues. Although this court is precluded from reviewing on the merits, it is not 'powerless' to give guidance . . . [citations omitted]. Our function is to review the allegations of the complaint to determine whether a substantial federal constitutional question is presented and whether there is a question fairly open to debate which would entitle Plaintiffs to the three judge relief requested." 497 F2d at 689.

Following our established practice we have considered the allegations made in this case and believe that a substantial federal question is presented. Of course the relief requested by Plaintiffs involves not only the rights of Plaintiffs but also the rights of the unknown parents and relatives.*[3] See: "Recognizing the

*[3] The rights of the unknown parents and relatives

Needs of Adopted Persons: A Proposal to Amend the Illinois Adoption Act", 6 Loyola U. Chi.L. Jour. 49 (1975); "The Adult Adoptee's Right to Know his Natural Heritage", 19 N.Y.L.R. 136 (1973). We express no view whatever with respect to the appropriateness of the relief requested nor do we attempt to evaluate or balance the interest of the parties.

Nevertheless, at this stage of the litigation our only decision is to determine whether Plaintiffs have presented a substantial federal question which meritsa hearing by a three judge court. Since we believe such a question has been presented we reverse the decision of the trial court and remand for the convening of a three judge court.

REVERSED AND REMANDED.

*3 (continued) were well represented on appeal by the "Association for the Protection of the Adoptive Triangle". The Association filed a brief as an amicus curiae. The basic purpose of the not for profit association is to arrange for mutually desired reunions of adopted children and their natural parents and relatives.